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March 10, 2005

BY E-FILING

The Honorable Kent A. Jordan
United States District Court
844 N. King Street
Wilmington, DE 19801

Re: Hamilton v. Levy, et al., C.A. No. 94-336-KAJ

Dear Judge Jordan:

This letter is intended to serve as plaintiff's proffer on the defendants' failure to search for or to preserve the minutes of the Central Institution Classification Board ("CICB") meeting held June 24, 1992. It was during this meeting that the board took "no action" on – and effectively rejected – the Multi-Disciplinary Team's "protective custody" recommendation for Mr. Hamilton. Shortly after this "no action" decision, Mr. Hamilton was assaulted in his cell, and this lawsuit followed.

The question presented is whether plaintiff should be permitted to present evidence that individual defendants failed to take steps to search for or to preserve the June 24, 1992 CICB minutes – the one document that likely to contain an explanation of why plaintiff was denied protective custody just a month before he was assaulted in his cell.

Defendant Levy, sued in 1994, testified that the minutes should have this information:

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Q. What information was on the minutes? Was it just the decision?

A. The inmate's name, there was a spot for the recommendation, **a spot for the decision, a spot for any other comments**, some other identifying information . . .

– Levy Dep. (July 12, 2004)
at 17:23-18:4 (emphasis added).

It does not appear that any defendant made an effort to find those documents. Defendant Stephenson, for example, testified:

Q: Have you taken part in a records search endeavoring to ascertain what records there are about the events which are the subject of this lawsuit?

A: No.

– Stephenson Dep. (Sept. 15, 1999) at 58:4-13.

Q: Putting aside that, if you have no memory of the meeting itself, have you made any effort to look for any notes or records or minutes or anything of that kind that would shed light on that action?

A: No.

– Id. at 75:22-76:2.

In 2004, Defendant Tillery testified:

Q. After these meetings were typed up and distributed, did you keep copies of these meeting minutes?

A. Yes, I did.

Q. Where did you keep them?

A. In a file in alphabetical – in chronological order in case you needed to refer back to the minutes.

Q. How long did you keep these for?

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A. I would keep mine for five years.¹

Q. After five years, what would you do with them?

A. They would archive them.

Q. Where did they archive?

A. They kept them in the penthouse at Gander Hill.

Q. Do you know if anyone else kept copies?

A. Well, all of the counselors kept copies of minutes. Well, the counselors at Gander Hill² – that's the only one I can speak for – kept copies. The central ICC kept copies as well as a reference point.

– Tillery Dep. (July 13, 2004) at 12:10-13:5.

Q: Do you still have your archives from 1992?

A: Yes.

Q: Where to you have those?

A: The archives up in the penthouse at Gander Hill.

Q: They would still have them back to 1992?

A: Yes.

* * *

Q. If you wanted to request those back, how would you do that?

A. I would ask security to go to that area and go through some file boxes. They are labeled on top by the year. And you look through them like that. He would bring me the box. And I would go through the box to find the specific one that I wanted.

¹ In this case, that means through 1997.

² E.g., defendants Levy and Minor (both sued in 1994) and Tillery.

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– Tillery Dep. (July 13, 2004) at 15:4-23.

After the Tillery deposition, defense counsel worked with Ms. Tillery to retrieve the box that should have contained the 1992 minutes. By that time, however, Ms. Tillery's 1992 box had been destroyed as part of the regular records destruction process for the Department of Correction.

Beyond Ms. Tillery's private, unsearched archives, there is no question that the CICB minutes were stored in Central Classification in Smyrna (the location at which the CICB meetings were held) until 1999 – at least one year after every defendant had been joined in the case. To Mr. Hamilton's detriment, however, no defendant requested the CICB to retrieve those minutes before they were destroyed:

- Q. If you wanted to go back and get copies of minutes, say, from the early 1990s, where would you go?
- A. I'd go to the Central Institutional Classification. The Central Classification Board. Well, no. I'd go to Central Classification, which was located at that time in Smyrna, and now it's in Dover.
- Q. Would they have copies? Where would they have copies?
- A. They had big filed cabinets that they kept, you know, those kinds of things.

– Tillery Dep. (July 13, 2004) at 13:22-14:8.

- Q. Do you have any recollection of that meeting?
- A. No.
- Q. Do you know anybody that would have recollection of that meeting?
- A. It would be a part of classification records, I mean, the minutes that would be located at the classification office. That's all I know.

– Cockroft Dep. (July 21, 2004) at 10:18-22.

- A. No. No. There's minutes for that that are done. The attendance sheet is just a cover sheet that lets us know who was there and who wasn't. Then, when the minutes come

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out, the secretary would type that up, put members present, members absent, and the date of the meeting, go with the minutes.

Q. Those minutes, where are they stored?

A. They used to be stored in the administrative building. I was actually the secretary of the CICB before I became a classification officer so I maintained them prior to this.

– Shotzberger Dep. (Nov. 3, 2003) at 12:13-23.³

Q. Minutes would have been kept with –

A. They would be bound like your books are here generally by year. When I was secretary, I used to keep them forever because they are actually a legal record. And then the administrative building moved, and a lot of the historical documents were destroyed or thrown away.

– Id. at 16:8-14.

Later in the deposition, counsel explained exactly when the historical documents – including the critical CICB minutes – were thrown away:

Mr. Niedzielski:

When they moved the administrator from would be Monrovia Avenue, Smyrna, to Dover **in 1999, they discarded just about anything, including all the minutes** and most portions of the interstate files and stuff like that . . .

– Id. at 83:13-19 (emphasis added).

The document destruction occurred approximately 5 years after the lawsuit was filed against defendants Levy, Queener, Minor, and Lewis, and approximately one year after the remaining defendants were added to the case.

Finally, it is likely that the defendants had an opportunity to preserve the minutes at some early point in the case. Specifically, the minutes were attached to the attendance lists for the CICB meetings that were used to answer interrogatories in 1998:

³ Ms. Shotzberger is a third party witness scheduled to testify at trial in the case.

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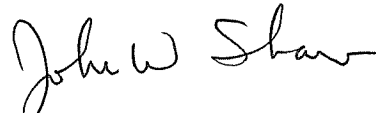
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- A. [Discussing PX 41, the June 24, 1992 CICB meeting attendance list] . . . This is what gets attached to the minutes. And it will tell you the meeting date and who was present, and then all these people get copies of the minutes once they are done.

– Shotzberger Dep. 15:14-17.

The attendance sheets were used by defendant Minor in 1997 or 1998 to identify the persons who attended the June 24, 1992 CICB meeting in her interrogatory answers. This interrogatory response led to the joinder of the CICB defendants other than Ms. Lewis.

Respectfully submitted,



John W. Shaw

JWS/pt

cc: Clerk of the Court (via e-filing)
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